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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO. _____

ALGA, INC., d/b/a MONTGOMERY BOOK MART, An Alabama Corporation; and JAMES M. TRINKLE,

Petitioners,

v.

DAVID CROSLAND, ESQUIRE, in his capacity as District Attorney for the 15th Judicial Circuit of ALABAMA; and JACK B. RUCKER, ESQUIRE, in his capacity as Police Commissioner for the City of Montgomery, Alabama,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Alga, Inc. and James M. Trinkle, Petitioners, pray that a Writ of Certiorari be issued to review the Judgment of the United States Court of Appeals for the Fifth Circuit, entered in this case on May 16, 1972.

OPINIONS BELOW

The Memorandum Opinion of the District Court is reported at 327 F. Supp. 1264 (1971) and is also included as Appendix A herein. The opinion of the Court of Appeals is reported at 459 F.2d 1038 (1972) and is included herein as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on May 16, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Following Acts Of State Law Enforcement Officials Entitle The Owner And Manager Of An Adult Book Store To Equitable Relief From State Criminal Prosecutions For Distributing Allegedly Obscene Materials:

Preparation and presentation to the manager of a list of two hundred seventy-seven (277) publications which were thought to be obscene, at least one hundred twenty-five (125) of which were pocket novels containing at least one hundred forty (140) pages each of textual matter, and thirty-nine (39) 8 mm motion picture films, following a two and one-quarter (2-1/4) hour inventory of the contents of an adult book store during which time customers' names and addresses were taken so that they could be subpoenaed to Court to "explain to their wives and children what they were doing buying this stuff", thereby causing said customers to leave; threats to prosecute for selling any of said materials; the taking of pictures and movies of the interior of said book store; the

admonition to the manager that he could not "sell anything"; the sifting through a trash container on the premises; the threat to the manager of said store that they were going to "run his ass out of town"; the compilation and service upon the manager of a second list of "forbidden" materials after four days, during which nothing at all was sold for two days and nothing on the first list was sold, said second list totalling four hundred twenty-seven (427) items, of which approximately two hundred (200) were pocket novels containing at least one hundred forty (140) pages each of textual matter, together with fifteen (15) 8 mm motion picture films; said lists comprising substantially all of the said store's inventory and having been made without review of the publications in their entirety or review of the films; said second inventory being made to "make sure you won't have anything for sale"; the arrest of the manager on the same day that the second list was served for selling publications on said list and imposition of a bond in the amount of $10,000.00 for said misdemeanor; followed by an arrest and filing of three separate similar charges against the manager, approximately one week later and the setting of bond on each charge at $5,000.00, or a total of $15,000.00.

2. Whether The Anti-Injunction Act, Title 28 U.S.C. §2283, Bars Relief Under Title 42 U.S.C. §1983, Under Such Circumstances.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the *First, Fifth and Fourteenth Amendments to the Constitution of the United States,* Title 28 U.S.C. § 2283, Title 14, Code of Alabama of

1940, and Act 698 of the 1969 Regular Session of the Alabama Legislature are all set forth in Appendix "C" hereto.

STATEMENT OF THE CASE

Alga, Inc. and Trinkle filed a complaint in the United States District Court for the Middle District of Alabama, Southern Division, alleging that Respondents, under color of statutes of the State of Alabama, were depriving them of their constitutional rights to freedom of speech and press and that the statutes were invalid as written and applied. An amendment was added clarifying certain facts concerning appeal bonds of Petitioner Trinkle.

Petitioners prayed for a preliminary injunction to restrain Respondents from suppressing presumptively protected First Amendment materials made the basis of the arrest of Petitioner James M. Trinkle, an employee of Petitioners, Alga, Inc., and from future arrests; a declaratory judgment; permanent injunctions; and damages under *Title 42 U.S.C.A. § 1983, Title 28 U.S.C.A. § 1343 (3) and (4), Rule 57* of the *Federal Rules of Civil Procedure, Article III, Section 2,* of the *Constitution of the United States, Title 28 U.S.C.A. § 2201, Rule 65* of the *Federal Rules of Civil Procedure,* and the convocation of a three-judge Court under *Title 28 U.S.C.A. §§2281 and 2284.*

Petitioners Alga, Inc. and Trinkle are owner and manager of the Montgomery Book Mart, respectively. Said Montgomery Book Mart is an adult book store, selling presumptively protected *First Amendment* materials to interested adults. On or about March 26, 1971, Trinkle opened said store, located at 326 Montgomery Street, Montgomery, Alabama, having first obtained appropriate city,

county, and state licenses for the conduct of such business, including sales tax registration.

Said store, before it was opened, was painted so that all window and door glass was opaqued to the extent that it was impossible for persons passing along the street to see inside the building or to view any material on display for sale or viewing and large letter signs were painted on the store front and door, stating, "Be prepared to show proof of age, no one under eighteen (18) admitted."

On the day that Petitioners' store was opened, Montgomery Police Chief Wright, and the Assistant Police Chief, came in and examined Petitioners' licenses and made inquiry of Petitioner Trinkle concerning the operations of Petitioner Alga, Inc. The following day, March 27, 1971, Respondent Crosland, District Attorney for Montgomery County, Alabama, Sheriff Butler, Chief Wright, the Assistant Police Chief, Respondent Jack B. Rucker, Police Commissioner for the City of Montgomery, Alabama, and other law enforcement officials descended upon Petitoners' place of business, disrupting it and creating general havoc. Said officials on this occasion began taking the names of the store's customers, causing them great embarrassment, and effectively causing all of them to leave the premises. Respondent Crosland, in his capacity as District Attorney, informed Petitioner Trinkle, that he was going to make up a list of what he, Crosland, considered obscene and was going to give this list to Petitioner Trinkle and would prosecute said Petitioner Trinkle for selling any of these materials. The Respondents, together with their agents, servants, and employees, took pictures and movies of Petitioners' place of business on this occasion, and Respondent Crosland informed

Trinkle that he could not "sell anything", although he did not have to close his doors. Respondents, on this occasion, even went so far as to sift through Petitioners' trash that had been discarded in an effort to disrupt Petitioners' business. On said occasion, the Respondents arrived at Petitioners' place of business at about 10:45 a.m. and stayed until approximately 1:30 p.m. when, as a result of their activities, Trinkle was forced to close the business. Respondents and their agents, servants, and employees, made an inventory of the publications in the store on this occasion.

Thereafter, Respondents served a letter in the form of an order on Trinkle which, in essence, provided that:

> "In accordance with the provisions of *Section 4(a), Act 698, Regular Session of the Alabama Legislature, 1969,* you are hereby notified that there is cause to believe that the material as shown on the attached list, being exhibited for a monetary consideration and sold by you, is in violation of *Act 698 supra.* You are further notified that you will be prosecuted for exhibiting or selling any of the said materials after receiving this notice."

Attached thereto was a list noting the names and titles of two hundred seventy-seven (277) publications, of which one hundred twenty-five (125) were pocket novels containing at least one hundred forty (140) pages each of textual matter, and thirty-nine (39) 8 mm motion picture films. The publications on the list and the films were not viewed in their entirety by Respondents, their agents, servants, and employees, and were, in fact, a listing off substantially all of the publications in the store offered for sale.

Two of the publications on the list which Respondent Crosland deems to be obscene and in violation of *Section (a), Act 698, of the Regular Session of the Alabama Legislature, 1969,* are entitled "Super Sex to Sexty", Issue No. 14, and "Togetherness Sex to Sexty", Issue No. 23. Copies of these two publications were attached to the Complaint filed by Petitioners as Exhibits "B" and "C" in support of their Complaint, and the contents of same were incorporated therein by reference.

Respondents Crosland and Butler both told Petitioner Trinkle that they were going to "run his ass out of town".

Respondent Crosland, with reference to the customers whose names had been taken in Petitioners' place of business, stated to Trinkle that they intended to subpoena them and have the "sons of bitches explain to their wives and children what they were doing buying this stuff."

On or about April 1, 1971, Respondents again compiled and served Trinkle with a new listing dated April 1, 1971, and attached thereto was a schedule of publications deemed to be obscene, totaling four hundred twenty-seven (427) in number, of which approximately two hundred (200) were pocket novels containing at least one hundred forty (140) pages in each of textual matter, together with fifteen (15) 8 mm motion picture films. The agents, servants, and employees of Respondents who were in the Petitioners' store made a list of substantially all of the inventory available for sale, yet spent only two hours in the store on that occasion composing the list and did not review the publications in their entirety or view the films.

On March 29, 1971 and March 30, 1971, Trinkle opened the store under the restrictions imposed by Respondents, being prevented from selling any publications. This situation continued until about 7:00 p.m. on March 31, 1971, when Trinkle again began selling publications.

On April 1, 1971, Trinkle sold publications up until the time he was arrested and taken to jail, but at no time did he offer for sale or sell any of the two hundred seventy-seven (277) publications alleged to be obscene by Respondent Crosland on March 27, 1971. On this date, Respondents' agents, servants, and employees returned and informed Trinkle that they were back to "inventory" him again in order to "make sure you won't have anything for sale" and made up the second list of "forbidden" books and films, which they gave to Trinkle. On April 1, 1971, at the instruction of Respondents, Stewart Moody, as the agent, servant, and employee of Respondents and/or under their direction and control purchased four (4) publications from Petitioners' place of business, which were presumptively protected *First Amendment* printed publications and materials, and thereafter, signed a complaint charging Trinkle with sale and possession of obscene printed or written material. The complaint charged Trinkle with a violation of the law, without regard to the constitutional requisite, *scienter*.

On April 1, 1971, Trinkle was arrested and placed in the Montgomery County jail upon a charge apparently predicated under *Title 14, Section 374(4)*. This charge, under Alabama law, is a misdemeanor, yet Respondents induced a bond to be set in the amount of $10,000.00. Due to Trinkle's being held under this bond, Petitioner Alga, Inc. was unable to obtain his release until the following day, April 2, 1971, at

approximately 3:30 p.m., and incurred a fee of $1,500.00 to procure said bond.Petitioners' place of business was closed until April 5, 1971 as a result of Respondents informing Trinkle that they would arrest him or anyone else operating Petitioners' place of business as soon as it re-opened, coupled with the other conduct of Respondents.

Subsequent to the filing of the complaint in this cause on April 9, 1971, Trinkle was arrested on three charges similar in all respects to the one referred to in the complaint. These charges grew out of multiple purchases by agents, servants, and employees of Respondents acting at their instance. Rather than making one charge against Trinkle,three separate cases were made against him, each charging him with a violation of a misdemeanor, yet Respondents induced bonds to be set in the amount of $5,000.00 each, totalling $15,000.00. Trinkle was unable to obtain his release until Monday, April 12, 1971. Due to Trinkle's being held under these bonds, which would have required the paying of a bond fee in the amount of $2,250.00, Petitioners employed counsel to obtain a *habeas corpus* proceeding, which was filed in the Circuit Court of Montgomery County, Alabama, before the Honorable Richard Emmett, after an appeal had been made to Respondent Crosland to reduce the bonds, at which time Respondent Crosland stated that he did not think the bonds were high enough. Said habeas corpus proceeding filed in the Circuit Court resulted in the bonds being reduced to the aggregate amount of $10,000.00. Petitioners then filed a habeas corpus proceeding in the Alabama Court of Criminal Appeals, which resulted in the bonds being reduced to the aggregate amount of $2,250.00, which bond Trinkle was able to purchase and obtain his release from jail.

Petitioner Trinkle was subsequently tried and convicted in his four cases and presently has appeals pending in the Court of Criminal Appeals of Alabama.

HOW FEDERAL QUESTIONS ARE PRESENTED

The Respondents filed a Motion to Dismiss on April 27, 1971. On June 18, 1971, his Honor, Judge R.E. Vanner filed his memorandum Opinion ordering and decreeing that the Motion to Dismiss be granted and the Complaint, as amended, be dismissed,with the costs assessed against Petitioner.

No evidentiary hearing was held. At the time of the hearing it was stated by counsel for the respective parties that the harassing conduct complained of had abated, and counsel for Respondents stated to the Court that it would not re-occur.

The trial court viewed the issues as follows:

"The outcome of this case hinges on four questions: (1) Under what circumstances may a Court of the United States grant an injunction to stay proceedings in a state court? (2) Under what conditions may other relief be granted where the anti-injunction statute (28 U.S.C., §2283) makes granting of an injunction improper? (3) Does the question of damages for admittedly discontinued harassment, such as that alleged in the Complaint (requiring an excessive bond, threatening customers of the Petitioner, and threatening to run Petitioner out of town) involve substantial matters which the Federal Courts should inquire into in the absence of jurisdiction to

grant the injunction? (4) In cases wherein it is necessary for a three-judge court to grant the relief prayed for, may one District Judge deny relief barred by 28 U.S.C., §2283?" *Alga, Inc. v. Crosland*, 327 F. Supp. 1264 (1971) (Appendix A).

The trial court ruled that the "*Younger v. Harris Sextet*" and the Anti-Injunction statute required the dismissal of the action, despite the "question of damages for admittedly discontinued harassment."

Timely appeal was taken to the Court of Appeals for the Fifth Circuit which affirmed. The Fifth Circuit felt itself limited in its review by Federal Rules of Civil Procedure 52 and interpreted the pleadings in that Court as alleging "only that the district court erred in finding" the presence of neither "danger of suffering great and immediate irreparable harm" or "bad faith, without expectation of conviction and only for purposes of harassment." *Alga, Inc., v. Crosland*, _____ F.2d _____ (1972) (Appendix B).

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS ERRED IN APPLYING F.R.C.P. 52 TO THE TRIAL COURT'S DECISION.

The Court of Appeals for the Fifth Circuit based its decision upon Federal Rule of Civil Procedure 52 which provides, *inter alia:*

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the

> opportunity of the trial court to judge of the credibility of the witnesses."
> Fed. Rules Civ. Proc. rule 52, 28 U.S.C.

The decision of the trial court was made on a Motion to Dismiss following an oral argument unaccompanied by the taking of evidence. No findings of fact were made and none were required under Rule 52. However, the Court did speak of "inquiry which has occurred . . . in the past" and stated there is "no present threat of any further inquiry until determination of the matter by the Courts." 327 F. Supp. 1264, at 1266 (Appendix A). The trial court recognized that "harassment is claimed in the instant case." The trial court viewed the matter as "centrally and primarily a suit for an injunction, which should rise and fall under the injunction law, the matter of damages being merely incidental to the mainstream of this cause." 327 F. Supp. 1264, at 1266 (Appendix A).

The Court was of the view that the *Younger v. Harris*, sextet "clarified certain questions which had arisen in association with construction of the Anti-Injunction Act" and that consideration of "federalism" prevented injunctions against pending state criminal prosecutions absent bad faith, harassment, or other unusual circumstances that would call for equitable relief. However, the trial court felt that "perhaps our federalism' is best defined by 22 U.S.C. 2283." 327 F. Supp. 1264 at 1265 (Appendix A).

In essence, then, the trial court felt the Anti-Injunction statute mandated a dismissal and the Court of Appeals thought the trial court had made a factual determination based on an evidentiary hearing, when said hearing never took place. The result is that the allegations of harassment and bad

faith enforcement contained in the complaint have been ignored and petitioners have never had the opportunity to prove their allegations.

The clearly erroneous test does not apply to decisions on motions under Rule 12. *B.J. Semel Associates, Inc. v. United Fireworks Mfg. Co.*, 355 F.2d 827 (D.C. Cir. 1965). Since for purposes of a motion to dismiss the well pleaded material allegations of the complaint are taken as admitted, *Walker Process Equipment v. Food Mach. and Chem. Corp.*, 382 U.S. 172 (1965); *Gardner v. Toilet Goods Ass'n.*, 387 U.S. 167 (1957), *Clark v. Nebesee Finanz Korporation, A.G.*, 332 U.S. 480 (1947) the decision to dismiss was a ruling on a question of law and the Fifth Circuit was erroneous in feeling it had "little choice here but to affirm." (Appendix B).

II.

THE EVENTS LEADING UP TO AND INCLUDING THE ARREST OF PETITIONER TRINKLE, PETITIONER ALGA, INC.'S EMPLOYEE, UNDER THE CIRCUMSTANCES ALLEGED, ARE EVIDENCE OF BAD FAITH AND HARASSMENT SUCH AS WOULD ENTITLE PETITIONERS TO EQUITABLE RELIEF, AND THEREFORE, THE TRIAL COURT SHOULD NOT HAVE DENIED EQUITABLE RELIEF AND GRANTED RESPONDENTS' MOTION TO DISMISS.

The trial court was of the opinion that the complaint should be dismissed, even though harassment was alleged. It also took the position that, despite the availability of relief against a state official who, acting unconstitutionally, violates

constitutional rights of individuals, the suit was primarily a suit for an injunction, and damages being only incidental. Petitioners were not entitled to a hearing on that part of their claim, either.

The Court expressly based its holding on *Dyson v. Stein*, 401 U.S. 200 (1971); *Perez v. Ledesma*, 401 U.S. 82 (1971); and other cases. The only other cases discussed in that context were *Younger v. Harris*, 401 U.S. 37 (1971) *Samuels v. Mackell*, 401 U.S. 66 (1971); *Boyle v. Landry*, 401 U.S. 77 (1971), and *Byrne v. Karalexis*, 401 U.S. 216 (1971). In any event, these cases do not mandate the result reached by his Honor Judge Varner and by the Fifth Circuit, which also relied upon them.

Dyson, supra, merely stated that federal intervention affecting pending state criminal prosecutions, either by injunction, or by declaratory judgment, is proper only where irreparable injury is threatened. However, that issue was not before the Court:

> "The existence of such injury is a matter to be determined carefully under the facts of each case. In this case, the District Court made no findings of any irreparable injury as defined by our decisions today, therefore, the judgment of the District Court is vacated and the case is remanded for reconsideration in light of *Younger v. Harris, ante*, p. 37, and *Samuels v. Mackell, ante*, p. 66. See also, *Boyle v. Landry*, p. 77." *Dyson v. Stein*, 401 U.S. at 203.

That case makes it clear that, if the appropriate findings are made by the trial court after remand, injunctive relief *would* be in order.

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II.

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The trial court was of the opinion that the complaint should be dismissed, even though harassment was alleged. It also took the position that, despite the availability of relief against a state official who, acting unconstitutionally, violates

constitutional rights of individuals, the suit was primarily a suit for an injunction, and damages being only incidental, Petitioners were not entitled to a hearing on that part of their claim, either.

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> "The existence of such injury is a matter to be determined carefully under the facts of each case. In this case, the District Court made no findings of any irreparable injury as defined by our decisions today, therefore, the judgment of the District Court is vacated and the case is remanded for reconsideration in light of *Younger v. Harris, ante*, p. 37, and *Samuels v. Mackell, ante*, p. 66. See also, *Boyle v. Landry*, p. 77." *Dyson v. Stein*, 401 U.S. at 203.

That case makes it clear that, if the appropriate findings are made by the trial court after remand, injunctive relief *would* be in order.

Perez v. Ledesma, supra, involved the direct appeal from a ruling by a three-judge court that a Louisiana statute was valid but, since the arrests and seizures were invalid, the illegally seized material should be suppressed and could not be used in state criminal proceedings against the appellees in that case. An ordinance was also considered, but the three-judge court, after acknowledging that it had no jurisdiction to pass on the constitutionality of the ordinance, expressed the view that it was invalid. The single-judge court then declared the ordinance to be unconstitutional. The appeal was from both orders. This court decided it did not have jurisdiction to review the decision of the single-judge court and vacated and remanded that portion of the decision. It dealt with the suppression of the seized materials by holding that the three-judge court erred in so stifling the still pending criminal prosecution. *Perez v. Ledesma,* 401 U.S. 82 at 84. However, this decision is grounded upon the absence of bad faith:

> "There is nothing in the record before us to suggest that Louisiana officials undertook these prosecutions other than in a good-faith attempt to enforce the State's criminal laws. We, therefore, hold that the three-judge court improperly intruded into the State's own criminal process and reverse . . ." *Perez v. Ledesma, supra,* at 85.

This Court, only a few lines above those quoted hereinabove, set out instances when federal injunctive relief against pending state prosecutions is appropriate:

> "Only in cases of proven harassment *or* prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction and perhaps in other extraordinary circumstances where irreparable injury can be shown is federal injunctive

relief against pending state prosecutions appropriate. See *Younger v.Harris, supra. Ex parte Young*, 209 U.S. 123 (1908)." *Perez v.Ledesma, supra,* (Emphasis added).

From the above cases, the trial court found that in the absence of a clear showing of bad faith, harassment, or some unusual circumstance . . . , the federal court should not interfere.

The allegations of the complaint clearly set forth acts constituting bad faith and harassment. The Petitioner Trinkle was placed under $10,000.00 bond for a misdemeanor late in the afternoon when no judges would be available, thus presenting a Hobson's choice of either letting him remain in jail or putting up the exhorbitant bail demanded and that his release could not be secured until 3:30 p.m. the following day and Petitioners incurred a bond fee of $1,500.00 to obtain the necessary bond. Because Petitioner Trinkle was told that he or anyone else operating the business would be arrested as soon as it re-opened, the business was closed from April 1, 1971 until April 5, 1971. None of the materials placed on the lists were reviewed in their entirety before being placed on said lists by Respondent Crosland. Customers were asked their names and addresses, and it was said that they would be subpoenaed to have the "sons of bitches explain to their wives and children what they were doing buying this stuff." Petitioner Trinkle was told by Respondents Crosland and Butler that they were going to "run his ass out of town." On April 1, 1971, Respondents' agent, servants or employees returned to the Montgomery Book Mart and informed Petitioner Trinkle that they were back to "inventory" him again to "make sure you won't have anything for sale" and made up a second list of "forbidden" books and films, which they gave to Petitioner Trinkle.

It is obvious that the above facts, when proven, will point to no other conclusion that the activities of Petitioners were aimed at putting the Montgomery Book Mart out of business by arbitrarily putting every publication on the premises on the list authorized by the *Alabama Obscenity Code*, and then prosecuting anyone with the temerity to exercise his rights to distribute such presumptively protected *First Amendment* materials.

The present case is one in which there was bad faith and harassment, and federal jurisdiction is present in *Title 28, U.S.C. 1343*, and *Title 42, U.S.C. § 1983.*

When allegations of bad faith and harassment are made, as in the instant case, then injunctive relief is appropriate unless as the trial court felt, it is barred by the *Anti-Injunction Act, Title 28, U.S.C. §2283.*

III.

APPLICATION OF THE ANTI–INJUNCTION ACT, 28 U.S.C. §2283, TO BAR INJUNCTIVE RELIEF WAS ERRONEOUS IN VIEW OF THIS COURT'S DECISION IN MITCHUM V. FOSTER, _____ U.S. _____ 92, S. Ct. _____, 32 L.Ed. 2d 705 (1972).

The trial court, as indicated previoulsy, felt that the questions it had to decide were:

"(1) Under what circumstances may a Court of the United States grant an injunction to stay proceedings in a state court? (2) Under what conditions may other relief be granted where the anti-injunction statute (28 U.S.C., §2283) makes

granting of an injunction improper? (3) Does the question of damages for admittedly discontinued harassment, such as that alleged in the Complaint (requiring an excessive bond, threatening customers of the Petitioners, and threatening to run Petitioner out of town) involve substantial matters which the Federal Courts should inquire into in the absence of jurisdiction to grant the injunction? (4) In cases wherein it is necessary for a three-judge court to grant the relief prayed for, may one District Judge deny relief barred by 28 U.S.C., §2283?" *Alga v. Crosland*, 327 F. Supp. 1264 (1971) (appendix A)

The Court clearly felt that 28 U.S.C. §2283 barred injunctive relief. The Fifth Circuit did not review that decision because of its applicationof the "clearly erroneous" rule of Fed. Rule Civ. Proc. 52 which Petitioner contends was a mistake. In effect, the judgment of the trial court is that of the Fifth Circuit.

This Court held in *Mitchum v. Foster*, _____ U.S. _____ 92 S.Ct. _____ 32 L. Ed. 2d 705 (1972) that 42 U.S.C. § 1983 (the statute under which petitioners sought redress) constitutes an "expressly authorized" exception to 28 U.S.C. §2283 and that §2283 does not preclude injunctive relief in an action under 42 U.S.C. §1983.

It is clear that the trial court's decision was based on its feelings that it could grant no relief of any kind due to 28 U.S.C. §2283 and that the Fifth Circuit considered more of the issues raised because it erroneously felt that an evidentiary hearing had been held in which the trial court evaluated witnesses and made determinations of fact which it could not disturb unless clearly erroneous.

CONCLUSION

The combination of the trial court's erroneous dismissal because of the Anti-Injunction Statute and the Fifth Circuit's mistake in applying the "clearly erroneous" rule to a ruling on a motion to dismiss have resulted in the Petitioners' not having any hearing on the merits of their claim whatsoever, including the issue of damages for conduct that has never been denied. Such a result is unjust and the petition should be granted and the Fifth Circuit directed to remand the case to the trial court for further proceedings.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

ALGA, INC., ET AL,

Petitioners,

v. Civil Action No. 3304-N

DAVID CROSLAND, ET AL,

Defendants.

MEMORANDUM OPINION
(Filed Jun. 18, 1971)

Alga, Inc. Petitioner in the above-styled cause, brings this cause against Police Commissioner Rucker and District Attorney Crosland to enjoin prosecution by city and county authorities of the Petitioners in cases arising under the so-called anti-obscenity law of the State of Alabama, to obtain a declaratory judgment concerning constitutionality and for damages for alleged harassment associated with said prosecution.

The outcome of this case hinges on four questions: (1) Under what circumstances may a Court of the United States grant an injunction to stay proceedings in a state court? (2) Under what conditions may other relief be granted where the anti-injunction statute (28 U.S.C., §2283) makes granting of an injunction improper? (3) Does the question of damages for admittedly discontinued harassment, such as that alleged in the Complaint (requiring an excessive bond, threatening customers of the Petitioner, and threatening to run Petitioner out of town) involve substantial matters which the Federal Courts should inquire into in the absence of jurisdiction to grant the injunction? (4) In cases wherein it is necessary for a

three-judge court to grant the relief prayed for, may one District Judge deny relief barred by 28 U.S.C., §2283?

On questions of whether or not an injunction or other relief is proper to control actions of a state law enforcement officer, two statutes are particularly pertinent:

> 28 U.S.C. 2283: "A court of the United States may not grant an injunction *to stay proceedings* in a State court except as expressly authorized by Act of Congress, or *where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.*"
>
> 42 U.S.C. 1983: "Every person, who *under color of any statute*, ordinance, regulation, custom, or usage, of any State or Territory, subjects or *causes to be subjected*, any citizen of the United States or other person within the jurisdiction thereof *to the deprivation of any rights*, privileges, or immunities secured by the Constitution and laws, *shall be liable to the party injured in an action at law*, suit in equity, or other proper proceeding for redress."

The Supreme Court, in 1971, clarified certain questions which had arisen in association with construction of the Anti-Injunction Act. *Younger v. Harris*, 91 S. Ct. 746, 27 L.Ed. 2d 669, 400 U.S._____ *Samuels v. Mackell*, 91 S. Ct. 764, 27 L. Ed. 2d 688, 400 U.S. _____, *Boyle v. Landry*, 91 S. Ct. 758, 27 L. Ed.2d 696, 400 U.S. _____, *Dyson v. Stein*, 91 S. Ct. 769, 27 L. Ed. 2d 781, 400 U.S. _____, *Perez v. Ledesma, 91 S. Ct. 674, 27 L. Ed. 2d 701, 400 U.S.* _____, *Byrne v. Karalexis*, 91 S. Ct. 777, 27 L. Ed.2d 792, 400 U.S. _____

The *Younger* case, supra, indicates that one who has not been indicted, arrested, or even threatened by the prosecutor has no standing to challenge the prosecution by injunction in the Federal Court, but that one who has been indicted is

precluded from seeking an injunction against pending state criminal proceedings under considerations of our "federalism". Perhaps our "federalism" is best defined by 22 U.S.C. 2283. In that case the plaintiff had failed to make "any showing of bad faith, harassment, or any other unusual circumstance that would call for equitable relief." 91 S. Ct. 755. The *Dyson* case, supra, wherein a person charged under the Texas obscenity statute had been given injunctive and declaratory relief on the basis of the district court's conclusion that the statute was unconstitutional in part, was reversed and remanded for consideration by the district court in the light of *Younger* and *Samuels*, since injunctive and supplementary relief in the Federal Court is proper only where irreparable injury is threatened.

The *Perez* case, supra, involved federal interference with enforcement of a Louisiana obscenity statute where state remedies were outstanding and indicated disapproval by the Supreme Court of such action. The *Byrne* case, supra, involved enforcement of the Massachusetts obscenity statute and disapproved of federal intervention where there had been no finding that the threat to plaintiff's constitutional rights was one that could not be eliminated by his defense against a single criminal prosecution.

The Supreme Court in *Samuels*, supra, indicated its disapproval of federal intervention and granting of supplementary relief where injunction was improper in the following language:

> "the same equitable principles relevant to the propriety of an injunction must be taken into consideration by federal district courts in determining whether to issue a declaratory judgment, and ***where an injunction would be impermissible under these principles, declaratory relief should ordinarily be denied as well." 91 S. Ct. at 768.

It would, therefore, appear that in the absence of a clear showing of bad faith, harassment, or some unusual circumstance, necessitating the intervention of the federal court, the federal court should not interfere with state prosecutions wherein the parties have rights to state relief.

It is noted that Professor Wright in his recent publication, *Federal Courts* 208 (2d ed. 1970), stated in regard to the *Younger* cases, which he refers to as "Dombrowski-type", the following:

> "It is to be hoped that the decisions in these cases will clarify the meaning of Dombrowski and will establish that every person prosecuted under state law for conduct arguably protected by the First Amendment cannot, by murmuring the words 'chilling effect,' halt the state prosecution while a federal court, ordinarily of three judges, passes on the validity of the statute and the bona fides of the state law enforcement officers."

As we understand the evidence in the instant case, injury which has occurred is a matter in the past and there is no present threat of any further injury until determination of the matter by the courts. This is not to say that the Petitioners are completely free of any possibility of prosecution for a clearly criminal act by the Defendants in this case. While harassment is claimed in the instant case and while this Court questions the propriety of setting a $10,000.00 bond for a misdemeanor, apparently relief was granted by the State Court against excessive bonds in the subsequent arrest of the Petitioners in this case, and no showing is made that Petitioner exhausted state remedies in seeking to obtain relief from the first excessive bond. There is absolutely no showing that there is any continued harassment of the Petitioners in this case by the state officials. Some may even think that the state officials are derelict in their duty for not seeking additional prosecutions of the Defendants for their continued

apparent violations of the state law. This Court understands that the Petitioners in this case have continued to operate and have continued to advertise adult type movies and literature in their current place of business in Montgomery.

This Court finds some confusion in the cases recognizing, or ignoring, the doctrine of official immunity as a complete defense to a suit against an officer. No complete answer lies in a determination of whether or not the act complained of was within the scope of employment of the Defendant official. Compare *Norton v. McShane*, 332 F2d 855, and *Kelley v. Dunne*, 344 F2d 129. Certainly, prosecuting attorneys and police officers have been held immune to prosecution for misconduct done within the scope of their official duties. *Schackman v. Arnebergh*, 258 F. Supp. 983. Yet, for many years the Supreme Court has held that a state officer, acting unconstitutionally, is stripped of his official or representative character and is subject to suit personally for the consequences of his individual conduct for violating constitutional rights of individuals. *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714; *Dombrowski v. Pfister*, 380 U.S. 479, 85 S. Ct. 1116, 14 L. Ed. 2d 22. Nonetheless, in this Court's view, this is centrally and primarily a suit for an injunction, which should rise or fall under the injunction law, the matter of damages being merely incidental to the mainstream of this cause.

This Court is of the opinion that federal relief should be denied to the Petitioners in this case on the basis of *Dyson, Perez*, and other cases, this Court never reaching the questioof constitutionality of the statute wherein a three-judge court should be empaneled. 28 U.S.C. §2281; *Duncombe v. State*, (D.C. N.Y. 1967) 267 F. Supp. 103; *Ex parte Poresky*, 290 U.S. 30, 78 L. Ed. 152; *Chicago, D. & G. B. Transit Co. v. Nims*, 252 F.2d 317. It is, therefore,

ORDERED and DECREED that the Motions to Dismiss of the Defendants in the above cause be, and the same are

hereby, granted, and the Complaint, as amended, is hereby dismissed and the costs assessed against the Petitioners.

DONE this 18 day of June, 1971.

R.E. Vorner
United States District Judge.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2653

ALGA, INC., ET AL,
Plaintiffs-Appellants,
v.
DAVID CROSLAND, ET AL,
Defendants-Appellees.
Appeal from the United States District Court
for the Middle District of Alabama
(May 16, 1972)

BEFORE THORNBERRY, COLEMAN and INGRAHAM, Circuit Judges.

PER CURIAM: Appellant Trinkle filed a complaint in the district court on April 8, 1971, seeking to enjoin his further prosecution under Alabama obscenity statutes and a declaratory judgment that such statutes were unconstitutional. It is clear that before a federal court can enjoin a state criminal prosecution, it must be alleged and factually supported that plaintiff is in danger of suffering great and immediate irreparable harm, or that he is being prosecuted in bad faith, without expectation of conviction and only for purposes of harassment. *Younger v. Harris,* 401 U.S. 37, 91 S. Ct. 746 (1971); *Samuels v. Mackell,* 401 U.s. 66, 91 S. Ct. 764 (1971); *Boyle v. Landry,* 401 U.S. 77, 91 S. Ct. 758 (1971); *Perez v. Ledesma,* 401 U.S. 82, 91 S. Ct. 676 (1971); *Dyson v. Stein,* 401 U.S. 200, 91 S. Ct. 769 (1971); *Byrne v. Karalexis,* 401 U.S. 216, 91 S. Ct. 777 (1971). Appellant here alleges only that the district court erred in finding the presence of none of these factors in the instant case. As we

are limited in our review in such a case by Fed. R. Civ. P. 52, we have little choice here but to affirm. See *Duncan v. Perez*, 5th Cir. 1971, 445 F.2d 557.

AFFIRMED.

APPENDIX C

FIRST AMENDMENT
CONSTITUTION OF THE UNITED STATES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacably to assembly, and to petition the Government for a redress of grievances.

FIFTH AMENDMENT
CONSTITUTION OF THE UNITED STATES

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; not shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FOURTEENTH AMENDMENT
CONSTITUTION OF THE UNITED STATES

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of

the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 28 U.S.C. §2283

§2283. Stay of State court proceedings

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction or to protect or effectuate its judgments. June 25, 1948, c. 646, 62 Stat. 968.

Title 14, Code of Alabama, of 1940

CHAPTER 64A.
ALABAMA LAW ON OBSCENITY.

* * *

§374 (1). **Title of Chapter.**—This chapter shall be known as the Alabama Law on Obscenity and may be referred to by that designation. (1961, p. 1310, §1, appvf. Sept. 8, 1961.)

Note. Section 18 of the act from which this chapter was codified provides, in part, that the repeal of laws inconsistent with the act shall not be construed to affect suits pending or rights existing or any liability incurred under those laws at the time the act took effect.

§374 (2). **Purpose of chapter.**—The spread of obscene publications, during the past several years, has become a matter of increasingly grave concern to the people of this state. The elimination of this evil and the consequent

protection of the citizens and residents of this state against such publications are in the best interests of the morals and general welfare of the people. The accomplishments of these ends can best be achieved by providing public prosecutors both with the speedy civil remedy for obtaining an judicial determination of the character and contents of publications and with an effective power to reach non-residents responsible for the composition, publication and distribution of obscene publications within this state. (1961, p. 1310, §2, appvd. Sept. 8, 1961.)

Interest of all people in state. – This section is a clear indication by the legislature that the publication or showing of obscene or pornographic printed or written matter is in the interest of all of the people of this state, and not merely to the people in a county of 600,000 or more population. McDowell v. Columbia Pictures Copr.. 203 So.2d 454 (Ala. 1967), holding Appx., § 1059 (14ff) et seq., to be unconstitutionally enacted local legislation.

§374(3). **Definitions.**–The following words, terms and phrases used in this chapter shall, for the purpose of this chapter, have the meaning respectively ascribed to them in this section:

"Mailable matter" means (a) printed or written matter or material having second class mailing privileges under the laws of the United States, or (b) any other printed or written matter or material which has not been determined to be nonmailable under the laws of the United States.

"Obscene" means lewd, lascivious, filthy and pornographic and that to the average person, applying contemporary community standards, its dominant theme takes as a whole appeals to prurient interest.

"Person" means any individual, partnership, firm, association, corporation or other legal entity.

"Printed or written matter or material" means any book, pamphlet, magazine, periodical, newspaper, picture magazine, comic book, story book, or other printed or written matter,

but does not include written or printed matter or material used by or in any religious, scientific or educational institution. (1961, p. 1310, § 3, appvd. Sept. 8, 1961)

§374(4). Importation, sale or possession of obscene printed or written matter; penalties.–(1) Every person who, with knowledge of its contents, sends or causes to be sent, or brings or causes to be brought into this state for sale or commercial distribution, or in this state prepares, sells exhibits or commercially distributes, or gives away or offers to give away or has in his possession with intent to sell or commercially distribute, or to give away or offer to give away, any obscene printed or written matter or material, other than mailable matter, or any mailable matter known by such person to have been judicially found to be obscene under this chapter shall be guilty of a misdemeanor and, upon conviction, shall be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than one year, and may be fined not more than two thousand dollars for each offense, or be both so imprisoned and fined in the discretion of the court.

(2) Every person who, with knowledge of its contents, has in his possession any obscene printed or written matter, or any mailable matter known by such person to have been judicially found to be obscene under this chapter shall be guilty of a misdemeanor and, upon convicton, shall be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than six months, or may be fined not more than five hundred dollars for each offense, or be both so imprisoned and fined in the discretion of the court. (1961, p. 1311, §4, appvd. Sept. 8, 1961.)

§374 (5). Equitable action to adjudicate obscenity of mailable matter imported, sold or possessed.–Whenever the solicitor for any judicial circuit or county solicitor has reasonable cause to believe that any person, with knowledge of its contents, is (1) engaged in sending or causing to be sent, bringing or causing to be brought, into this state for sale

or commercial distribution, or is (2) in this state, preparing, selling, exhibiting or commercially distributing or giving away, or offering to give away, or has in his possession with intent to sell, or commercially distribute, or to exhibit or give away or offer to give away, any obscene mailable matter, the solicitor for the judicial circuit or county into which such mailable matter is sent or caused to be sent, brought or caused to be brought, or in which it is prepared, sold, exhibited or commercially distributed or given away or offered to be given away, or possessed, may institute an action in equity in the circuit court or any court having equity jurisdiction of the affected county for an adjudication of the obscenity of the mailable matter. (1961, p. 1311, §5, appvd. Sept. 8, 1961.)

§374 (6). **Same; complaint.**—The action authorized by section 374(5) shall be commenced by the filing of a complaint to which shall be attached, as an exhibit, a true copy of the allegedly obscene mailable matter. The complaint shall:

(a) be directed against the mailable matter by name or description;

(b) allege its obscene nature;

(c) designate as respondents and list the names and addresses, as known, of its author, publisher and any other person sending or causing it to be sent, bringing or causing it to be brought into this state for sale or commercial distribution, and of any person in this state preparing, selling, exhibiting or commercially distributing it, or giving it away or offering to give it away, or possessing it with the intent to sell or commercially distribute or exhibit or give away or offer to give it away;

(d) pray for an adjudication that it is obscene;

(e) pray for a permanent injunction against any person sending or causing it to be sent, bringing or causing it to be brought, into this State for sale or commercial distribution, or in this state preparing, selling, exhibiting or commercially distributing it, giving away or offering to give it away, or possessing it with the intent to sell or commercially distribute or exhibit or give away or offer to give it away; and

(f) pray for its surrender, seizure and destruction. (1961, p. 1312, §6, appvd. Sept. 8, 1961.)

§374 (7). Same; dismissal; temporary injunction; order to show cause; service of process.—Upon filing of the complaint, described in section 376 (6), the solicitor or register of the court shall present the same, including the exhibit thereto, as soon as practicable to the court for its examination. If there is no probable cause to believe that the mailable matter described in the complaint is obscene, the court shall dismiss the complaint. If the court finds probable cause to believe that the mailable matter described in the complaint is obscene, it may forthwith issue an order temporarily restraining and prohibiting the sale or distribution of such matter and it shall issue an order to show cause why the same shall not be adjudicated obscene, returnable not less than ten days after its service, directed against the mailable matter by name or description and directing the service of a copy thereof, together with a copy of the complaint, upon such mailable matter and upon each of the respondents named in the complaint. Service of such order shall be editorial offices as shown therein. Service of such order may be made in any manner provided by law and, in case of mailable matter published or edited outside the state of Alabama and of any non-resident respondent, by registered or certified mail directed to the mailable matter or the respondent to be served at the address shown in the complaint. Proof of such mailing shall be deemed to be prima facie evidence of service of such order upon the mailable matter or any respondent for the

purposes of this section. (1961, p. 1312, §7, appvd. Sept. 8, 1961.)

§374 (8). Same; appearance, answer and trial date; order on default.—(1) On or before the return date specified in the order to show cause, the mailable matter and each respondent may appear and file defensive pleadings.

(2) The court may permit any person to appear and file an answer as amicus curiae.

(3) If no person files an answer or other defense on or before the return date specified in the order to show cause, the court may forthwith determine whether the mailable matter is obscene and enter an appropriate order.

(4) Upon the expiration of the time for filing answer and other defenses by the mailable matter and other respondents, the court shall set a date for the trial of the case. (1961, p. 1313, §8, appvd. Sept. 8, 1961.)

§374 (9). Same; speedy trials; rules of procedure.—The public interest requires that all actions prescribed by this chapter, other than criminal actions under section 374(4), be heard and disposed of with the maximum promptness and dispatch commensurate with constitutional requirements including due process freedom of press and freedom of speech. The rules of civil procedure pertaining to equity cases shall be applicable to the trial of such actions, except that the time limits therein concerning notice of trial, the presentation of evidence, and other proceedings may be shortened, if the party or parties affected or concerned have notice thereof and the court finds the same to be in the public interest. (1961, p. 1313, §9, appvd. Sept. 8, 1961.)

§374 (10). Same; decree; enforcement.—In the event the court finds the mailable matter to be obscene, it shall enter a decree to such effect and may, in such decree or in subsequent orders of enforcement thereof:

(a) enter a permanent injunction against any respondent, prohibiting him from doing or continuing to do any thing condemned by this chapter;

(b) direct any resident respondent to dispose of all such obscene mailable matter in his possession or under his control under such conditions and within such time as the court may find to be reasonable;

(c) direct all sheriffs in the state to seize and destroy all such obscene mailable matter in the possession or under the control of any respondent who shall fail to comply with the court's orders;

(d) enter any other and appropriate orders to effectuate the decree or injunction. (1961, p. 1313, §10, appvd. Sept. 8, 1961.)

§374 (11). Same; contents and effect of injunctions; service of copies of orders.—Every order granting an injunction shall set forth the reason for its issuance; shall be specific in terms; shall describe in reasonable detail and not by reference to the complaint, the act or acts restrained and shall be binding only upon the respondents, to the action and upon those persons in active concert or participation by contract or arrangement with such respondents who receive actual notice of the order by personal service or otherwise.

Copies of the order of the court, finding any matter to be obscene, and all orders of injunction issued in regard thereto, shall be served upon all respondents named in the complaint and in the manner as provided in section 374 (7) of this chapter. (1961, p. 1314, §11, appvd. Sept. 8, 1961.)

§374 (12). Importation, sale or possession of mailable matter found obscene.— Any mailable matter which is sent or caused to be sent, brought or caused to be brought into this state for sale or commercial distribution, or which in this state is sold, exhibited or commercially distributed, given

away or offered to be given away or offered to be given away by any person, with knowledge of the decree finding it to be obscene, or is in the possession of any such person with intent to sell or commercially distribute or exhibit, or give away or offer to give away, is subject to the provisions of section 374 (4) of this chapter. (1961, p. 1314, §12, appvd. Sept. 8, 1961.)

§374 (13). **Violation of injunction.**—Any respondent or any person in active concert or participation by contract or agreement with such respondent, with actual notice by personal service or otherwise, of any injunction or restraining order entered pursuant to sections 374(10 and 374(11) of this chapter, and who shall disobey any of the provisions thereof, shall be guilty of contempt of court. (1961, p. 1314, § appvd. Sept. 8, 1961.)

§374 (14). **Extradition of person in another state charged with continuing violation.**—In all cases in which a court has entered its decree pursuant to section 374 (10) that the mailable matter in question is obscene, and a charge of continuing violation is thereafter brought against a person who is a respondent to such decree, who cannot be found in this state, the governor shall, unless such person shall have appealed from such decree and such appeal has not been finally determined, demand his extradition from the executive authority of the state in which such person may be found pursuant to the laws of this state. (1961, p. 1315, §appvd. Sept. 8, 1961.)

§374 (15). **Presumption from possession of obscene matter; burden of proof.**—The possession of any three of the things enumerated in section 374 (4) of this chapter (except the possession of them for the purpose of return to the person from whom received) shall create a presumption that they are intended for sale or commercial distribution, exhibition or gift, but such presumption shall be rebuttable. The burden of proof that their possession is for the purpose

of return to the person from whom received shall be on the possessor. (1961, p. 1315, §15, appvd. Sept. 8, 1961.)

§374 (16). Nonresidents and others importing obscene matter submit to jurisdiction of courts.—In order to protect the morals and general welfare of the citizens and residents of this state against obscene printed or written matter or material originating outside of this state, it is the purpose of this section to subject to the jurisdiction of the courts of this state those persons, including non-residents, who are responsible for the importation of such matter into this state and, by such act, submit themselves to the jurisdiction of the court of this state and any action authorized by section 374(5) of this chapter. (1961, p. 1315, §16, appvd. Sept. 8, 1961.)

ALABAMA LAW
(Regular Session, 1969)
* * *
AN ACT (No. 698)

To prohibit the exposing of obscene and harmful materials to persons eighteen years of age and older; to define terms and to prescribe penalties.

BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

SECTION 1. Definitions. As used in this Act.

(a) "Nudity" means the showing of the human male or female genitals, pubic area or buttocks with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.

(b) "Sexual conduct" means act of masturbation, homosexuality, sexual intercourse, or physical contact with a

person's clothes or unclothed genitals, pubic area, buttocks, or, if such person be a female, breast.

(c) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(d) "Sado-masochistic abuse" means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained in the part of one so clothed.

(f) "Obscene" means that description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it:

(i) predominantly appeals to the prurient, shameful or morbid interest, and (ii) is patently offensive to prevailing or contemporary standards in the adult community as a whole with respect to what is suitable material, and (iii) is utterly without redeeming social value or importance.

(g) "Hard-core pornography" means material, when considered as a whole, its predominant appeal is to prurient interest, is patently offensive to prevailing or contemporary standards, is utterly without redeeming social value or importance and in addition it goes substantially beyond customary limits of candor in describing or representing such matters.

(h) "Knowingly" means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry or both:

(i) The character and content of any material described herein which is reasonably susceptible of examination by the defendant.

(ii) such term includes the calculated purveyance of filth.

(i) Mailable matter means (a) printed or written matter or material having second-class mailing privileges under the laws of the United States; or (b) any other printed or written matter or material which has not been determined to be non-mailable under the laws of the United States.

SECTION 2. Selling, exhibiting or possessing obscene materials. It shall be unlawful for any person knowingly to sell or loan for monetary consideration to a person eighteen years of age or older:

(a) any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct or sado-masochistic abuse and which is obscene or represents hard-core pornography.

(b) any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in paragraph (a) of section 2 hereof, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sado-masochistic abuse and which, taken as a whole, is obscene or represents hard-core pornography.

(c) Nothing in this section shall be deemed to apply to mailable matter unless such mailable matter is known by such person to have been judicially found to be obscene or to represent hard-core pornograpny under this act or under the provisions of any other Alabama statutes.

SECTION 3. It shall be unlawful for any person knowingly to exhibit for a monetary consideration to another or knowingly to sell to another an admission ticket or pass or knowingly to admit another for a monetary consideration to

premises whereon there is exhibited, a motion picture, show or other presentation which, in whole or in part, depicts nudity, sexual conduct or sado-masochistic abuse which is obscene or represents hard-core pornography.

SECTION 4. (a) No prosecution may be commenced against any person for violating Section 2 and 3 of this Act unless the accused is first served with prior written notice that there is reasonable cause to believe the material upon which such prosecution is based violates this Act, and the accused has, after receiving such notice violated this Act.

(b) The written notice provided for in paragraph (a) of this Section 4 may be given by only the following officials: the State Attorney General and any Assistant Attorney General; the district attorney, county solicitor, their assistants and deputies, or any person whose office and duty is to prosecute criminal actions before any state, county or municipal court; the sheriff; the chief of police of any municipality or town; and the duly authorized law enforcement employees of the Department of Public Safety.

(c) Any person receiving such written notice provided for in paragraph (a) of this Section 4 shall have the right within 30 days from such notice to file an appropriate action for declaratory judgment to determine the validity of such written notice, but no such action shall, by reason of the commencement thereof, stay or in any way delay or postpone any prosecution for the violation of this Act.

SECTION 5. Any person, firm or corporation violating any provision of this Act, shall be guilty of a misdemeanor and upon conviction shall be imprisoned in the county jail or sentenced to hard labor for the county, for not more than one year, and may be fined not more than two thousand dollars ($2,000.00) for each offense, or be both so imprisoned and fined, in the discretion of the court.

SECTION 6. The provisions of this Act are cumulative and shall be in addition to any and all laws now enacted dealing with obscene or hard-core pornography and shall not be construed to limit or repeal other laws on such matters and shall specifically apply to the exposing of obscene and harmful materials to persons eighteen years of age and older.

SECTION 7. This Act shall become effective immediately upon its passage and approval by the Governor or upon its otherwise becoming a law.

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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-248

ALGA, INC., d/b/a MONTGOMERY BOOK MART, An Alabama Corporation; and JAMES M. TRINKLE,

PETITIONERS,

v.

DAVID CROSLAND, ESQUIRE, in his capacity as District Attorney for the 15th Judicial Circuit of ALABAMA; and JACK B. RUCKER, ESQUIRE, in his capacity as Police Commissioner for the City of Montgomery, Alabama,

RESPONDENTS.

ON PETITION FOR A WRIT OR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-248

ALGA, INC., d/b/a MONTGOMERY BOOK MART, An Alabama Corporation; and JAMES M. TRINKLE,

PETITIONERS,

v.

DAVID CROSLAND, ESQUIRE, in his capacity as District Attorney for the 15th Judicial Circuit of ALABAMA; and JACK B. RUCKER, ESQUIRE, in his capacity as Police Commissioner for the City of Montgomery, Alabama,

RESPONDENTS.

ON PETITION FOR A WRIT OR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ISSUE PRESENTED FOR REVIEW

WAS THE UNITED STATES DISTRICT COURT CONSTITUTIONALLY JUSTIFIED, AS AFFIRMED BY THE COURT OF APPEALS, IN REFUSING TO ENJOIN STATE CRIMINAL PROCEEDINGS WHEREIN PETITIONERS ARE, IN FACT, BEING AFFORDED FULL CONSTITUTIONAL SAFEGUARDS?

STATEMENT OF THE CASE

Alga, Inc., d/b/a Montgomery Book Mart and James M. Trinkle, Petitioners here, filed a complaint in the United States District Court for the Middle District of Alabama, Northern Division, on April 8, 1971, seeking to enjoin prosecution under Alabama Obscenity Statutes and also seeking a declaratory judgment that such state statutes were unconstitutional. The Defendants in the District Court were David Crosland, in his capacity as District Attorney for the 15th Judicial Circuit of Alabama, and Jack B. Rucker, in his capacity as Commissioner of Public Affairs for the City of Montgomery, Alabama. The Petitioners amended their complaint on June 12, 1971, to allege additional state charges.

On June 18, 1971, the District Court granted the motion to dismiss the complaint which had been filed by the District Attorney and by the Commissioner of Public Affairs for the City of Montgomery, and which motion had been argued orally before the Court by counsel for Plaintiffs and Defendants below.[1] In dismissing the complaint, the District Court followed the cases of *Younger v. Harris,* 1971, 401 U. S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669; *Boyle v. Landry,* 1971, 401 U. S. 77, 91 S. Ct. 758, 27 L. Ed. 2d 696; *Samuels vs. Mackell,* 1971, 401 U. S. 66, 91 S. Ct. 764, 27 L. Ed. 2d 688; *Dyson v. Stein,* 1971, 401 U. S. 200, 91 S. Ct. 769, 27 L. Ed. 2 d 781; *Perez v. Ledesma,* 1971, 401 U. S. 82, 91 S. Ct. 674, 27 L. Ed. 2d 701; *Byrne v. Karalexis,* 1971, 401 U. S. 216, 91 S. Ct. 777, 27 L. Ed. 2d 792. The decision of the District Court was af-

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1. The decision of the District Court is reported as *Alga,* Inc. v. Crosland, 327 Fed. Supp. 1264.

firmed after oral argument by the United States Court of Appeals for the Fifth Circuit. 459 F. 2d 1038 (1972).

The Petitioners, Alga, Inc., and James M. Trinkle, refer in their complaint before the District Court and in their brief before the Court of Appeals to the state criminal proceedings which they seek to federally enjoin. In order to afford the Appellate Court a complete presentation of the issues, the Respondents herein, David Crosland, as District Attorney of the 15th Judicial Circuit of Alabama, and Jack B. Rucker, as Commissioner of Public Affairs of the City of Montgomery, with leave of the Court below supplemented the record by the inclusion therein of the criminal proceedings against the Petitioner, James M. Trinkle.

The record shows that there are now four criminal cases against James M. Trinkle on appeal to the Court of Criminal Appeals of Alabama. The complete transcripts of these proceedings have been transmitted to the State Appellate Court.

The record shows that the first of these cases was commenced by arrest on April 1, 1971, pursuant to a warrant issued by the County Court of Montgomery County, Alabama, and that the other three cases were commenced by arrest also pursuant to warrant on April 9, 1971. Each arrest warrant is supported by an affidavit setting forth the specific publication as constituting a violation of Title 14, § 374(4), Code of Alabama, 1940, as amended. Prior to the arrest in each case, the Petitioners were furnished with a list of publications in accord with the provisions of Act 698, Acts of Alabama, Regular Session, 1969. In fact, as shown by the complaint, the Petitioners were given

some five days' notice prior to the first arrest, during which period the Petitioners, by their own admission, were permitted to continue the operation of the book store.

The Petitioner Trinkle demanded a trial by jury in the Montgomery County Court and the cases were subsequently transferred to the Grand Jury Calendar in accord with Alabama Law. (*Streanger v. State*, 21 Ala. App. 600, 110 So. 595). The Grand Jury, upon its review of these cases, returned indictments on May 13, 1971. Petitioner Trinkle then filed a motion to quash the indictment, demurrers to the indictment, and a "Motion for Directed Verdict and/or in the Alternative to Dismiss". These demurrers and motions attack the constitutionality of Title 14 §§ 374(1) through 374(16), and of Act 698, supra, as all being repugnant to the First, Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States. The demurrers and motions present some sixty-two constitutional grounds of attack.[2] When the trial court denied the motions and overruled the demurrer, Petitioner Trinkle withdrew his jury demand and entered a plea of not guilty in each case upon an agreed stipulation of facts. The agreed stipulated facts included introduction of such publications entitled "Never Soft Always Hard", "Seduced in Every Way", "Tip to Bottom", "Call Boy", and others of similar nature. The State trial court, upon review of the evidence, entered the following decree:

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2. The questions of overbreadth, first amendment protection, the issue of "chilling and inhibiting effect", substantive due process, deprivation of liberty and/or property interests, prior restraint, obscenity *vel non* are all thoroughly raised in the state proceedings.

" The Defendant, appearing in person and by and through his attorney of record, withdraws his demand for trial by jury and enters a plea of not guilty without waiving any preliminary questions and insisting upon the Motion to Quash the Indictment, the Demurrer and Motion to Dismiss,

The Court is of the opinion that the Demurrer should be overruled, and the Motion to Quash and the Motion to Dismiss should be denied.

This cause then being submitted to the Court on an agreed stipulation of the facts, the Court finds as follows:

1. That there are no ideas presented in any of the materials having even the slightest social importance and furthermore the materials contain no redeeming social value;

2. The materials appeal solely to purient interest;

3. To the average person, applying contemporary community standards, the dominant theme of the materials, taken as a whole, appeal to the purient interest;

4. By present day standards of the community, the materials offend the common conscience of the community.

It is, therefore,

ORDERED, ADJUDGED and DECREED that the Demurrer be and the same is hereby overruled; that the Motion to Quash be, and the same is hereby denied and that the Motion to Dismiss be, and the same is hereby denied. It is further

CONSIDERED, ORDERED and ADJUDGED by the Court that the Defendant is guilty as charged in the indictment and a fine of $2,000.00 is assessed against him by the Court; said fine and costs not being presently paid, or otherwise secured, the said Defendant is sentenced to hard labor in the Montgomery County Jail for 515 days for the fine and 28 days for the costs and he is also sentenced to one year imprisonment in the County Jail for the sentence, said one year sentence to run concurrently with Cases No. (6331, 6332, 6333, and 6334).

And questions of law arising in this case for the decision of the Supreme Court and the Criminal Court of Appeals of Alabama, the Defendant in open Court gives notice of appeal and requests a suspension of the sentence pending appeal. It is, therefore,

CONSIDERED and ADJUDGED by the Court that this sentence be, and the same is hereby, suspended pending appeal and the Defendant admitted to bail in the sum of $3,000.00 to be approved by law."

REASONS FOR DISALLOWANCE OF WRIT

THE UNITED STATES DISTRICT COURT WAS CONSTITUTIONALLY JUSTIFIED, AS AFFIRMED BY HE COURT OF APPEALS, IN REFUSING TO ENJOIN STATE CRIMINAL PROCEEDINGS WHEREIN PETITIONERS ARE BEING AFFORDED FULL CONSTITUTIONAL SAFEGUARDS.

The complaint before the Courts below affirmatively shows that the Petitioners were continuing to operate their "adult book store". The complaint addi-

tionally shows that the Petitioner Trinkle was, in fact, being afforded affirmative state relief by virtue of habeus corpus and appellate processes in the state proceedings. The District Court, in referring to the circumstances, held that:

> ". . . there is no present threat of any future injury until a determination of the matter by the Courts". (app. 276).

It is significant to note that the Petitioner Trinkle demanded and was afforded the right to a trial by jury in the state misdemeanor proceedings, and that thereupon, in accord with Alabama Law, the cases were transmitted to a Grand Jury for review. Indictments were subsequently returned.

Petitioner Trinkle filed motions to quash and demurrers to the indictment and also filed a motion for a directed verdict. In these responsive pleadings, the same constitutional issues are presented in the state proceedings as are sought to be raised before this Court.

When the demurrer to the indictments and the motions were denied by the state trial judge in each case, the Petitioner withdrew the demand for a jury trial and entered a plea of not guilty upon a stipulation of facts. The cases against Petitioner Trinkle have now been, in fact, transcribed and transmitted to the Court of Criminal Appeals for the State of Alabama. The Petitioners now ask this Court to speculate that the state appellate tribunal will not afford a constitutional review of the issues there presented.

It is well settled that mere apprehension that the state court will not adequately protect a federal right is not a sufficient basis for the issuance of a federal injunction against state proceedings. *Amalgamated*

Clothing Workers v. Richman Brothers, 348 U. S. 511, 518, 75 S. Ct. 452, 456, 99 L. Ed. 600 (1955); *Atlantic Coastline R. Co. v. Brotherhood of Locomotive Engineers,* 398 U. S. 281, 90 S. Ct. 1739, 26 L. Ed. 234 (1970); Where an injunction is improper, declaratory relief should not be given. *Samuels v. Mackell,* supra.

The Supreme Court in *Atlantic Coastline R. Co. v. Brotherhood of Locomotive Engineers,* supra, clearly held:

> "First, a federal court does not have inherent power to ignore the limitations of §2283 and to enjoin state court proceedings merely because those proceedings interfere with a protected federal right or invade an area preempted by federal law, even when the interference is unmistakably clear."

Petitioner Trinkle is at the present time, indeed, being afforded a full and meaningful review of the legality of his two arrests, and of his subsequent convictions. The United States Supreme Court has specifically held that the propriety of arrests and the admissibility of evidence in state criminal prosecutions are matters properly to be resolved by state tribunals. *Stefanelli v. Minard,* 342 U. S. 117, 72 S. Ct. 118, 96 L. Ed. 138 (1951); *Perez v. Ledesma,* supra, 91 S. Ct. 674, at pp. 676-677.

The state court has suspended the sentences pending appeal and for aught that appears in this record, the Petitioner continues, as found by the District Court, to operate the "adult book store" and to advertise adult-type movies and literature. In any event, there is absolutely no showing that these Respondents have, in fact, prohibited a continued legal operation by Petitioners.

The United States Court of Appeals for the Fifth Circuit has followed the *Younger* series of cases in the following decisions: *Gornto v. Thomas,* 5th Cir. 1971, 439 F. 2d 1406; *Gordon v. Landrieu,* 5th Cir. 1971, 442 F. 2d 926; *Peoples v. City of Birmingham,* 5th Cir. 1971, 440 F. 2d 1352; *Coleman v. Yokum,* 5th Cir. 1971, 442 F. 2d 351; *Livingston v. Garmire,* 5th Cir. 1971, 442 F. 2d 1322; *Duncan v. Perez,* 5th Cir. 1971, 445 F. 2d 557; *LeFlore v. Robinson,* 5th Cir. 1971, 446 F. 2d 715.

These cases establish that the allegations of the instant complaint fail to establish sufficient grounds for federal injunctive and declaratory relief. This is not a case which falls within one of the narrowly drawn exceptions to Title 42, U. S. C. A., § 2283.

The complaint in this case fails to factually allege the narrow class of circumstances required by the recent decision of this Court in *Mitchum v. Foster,* ..... U. S. ....., 32 L. Ed. 2d 705, 92 S. Ct. 2151 (1972). The District Court and the Court of Appeals below were entirely justified from the record in finding an absence of sufficient factual allegations that the Petitioners were in danger of suffering great and immediate irreparable harm, or that they were being prosecuted in bad faith, without expectation of conviction and only for harrassment.

In *Coleman v. Yokum,* supra, in a case wherein a defendant sought to enjoin state criminal proceedings on the basis of an alleged unconstitutional state statue and upon the further ground that the state proceedings prohibited his right to a speedy trial, the Court held:

"Under these decisions (Younger, Boyle, Samuels,

Dyson, Perez and Byrne) the allegations of the complaint do not entitle Coleman to relief in the federal courts while his prosecution is pending in the state courts. *In those courts he will be able to attack the constitutionality of Article 580 of the Louisiana Code of Criminal Procedure and also to assert his right to a speedy trial.*" (Emphasis added)

From an analysis of the Appellate decisions as set forth above, and of the *Younger* series of cases, together with *Mitchum v. Foster*, supra, it is apparent that before a federal court will enjoin a state criminal prosecution, it must be factually alleged and factually supported that a defendant is being prosecuted in state court without expectation of conviction and only for harrassment. The injury must be a continuing one in order to afford equitable relief. The remedy of the state proceedings must be factually alleged to be inadequate to protect the constitutional rights of a defendant. The instant complaint fails to factually allege actionable conduct within the meaning of *Mitchum v. Foster*, supra, and of the Younger series of cases. The actual record of the state criminal proceedings establishes that Petitioners' constitutional rights are being protected.

When the rather lengthy complaint of Alga, Inc., and Mr. Trinkle is carefully analyzed, it becomes apparent that their conclusion of harassment and bad faith is drawn from four charges involving two arrests pursuant to Title 14, § 374(4) of the Alabama Code and the bond expense in these cases; from the state proceedings pursuant to Act 698 of the Alabama Legislature; and from what was allegedly said to Petitioner Trinkle by the local law enforcement officials.

The arrests were made after warrant for violation

of an Alabama criminal statute which was held constitutional by a three-judge federal court in the case of *Entertainment Ventures, Inc., v. Brewer*, 306 Fed. Supp. 802 (1969). Mr. Trinkle was afforded full review of the monetary amounts of the bonds and, in fact, did obtain relief in the state proceedings. It cannot be said that the Commissioner of Public Affairs and the District Attorney acted without expectation of conviction when they were proceeding pursuant to a law previously declared to be constitutional and when warrants issued by the Judge of the County Court of Montgomery County were based on affidavits setting forth the specific publications listed, i.e. "Never Soft Always Hard", "Seduced in Every Way", "Tip to Bottom", etc.[3]

The subsequent proceedings as shown by the record in the cases of Petitioner Trinkle establish the fact that these cases were handled in accord with normal and customary state criminal procedure and with the express purpose of seeking conviction for the violation of a constitutional criminal statue. The Petitioner Trinkle was allowed to make a single stipulation of facts applicable to each of the four cases. The hearings in each case were consolidated, for all practical purposes, and presented to the state trial judge at the same time. All penalties have been suspended pending the state appeals.

The notice which Alga, Inc., and James M. Trinkle received with regard to the list of material being sold

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3. Petitioners make no assertion in their District Court complaint or before this Court that the County Judge issued the warrants without making a constitutionally sufficient inquiry into the factual basis of the officers' conclusion.

was transmitted to them in accord with and pursuant to §4 of Act 698, supra. This section reads as follows:

"*Section 4.* (a) No prosecution may be commenced against a person for violating Sections 2 and 3 of this Act unless the accused is first served with prior written notice that there is reasonable cause to believe the material upon which such prosecution is based violates this Act, and the accused has, after receiving such notice violated this Act.

(b) The written notice provided for in paragraph (a) of this Section 4 may be given by only the followng officials: the State Attorney General and any Assistant Attorney General; the district attorney, county solicitor, their assistants and deputies, or any person whose office and duty is to prosecute criminal actions before any state, county or municipal court; the sheriff; the chief of police of any municipality or town; and the duly authorized law enforcement employees of the Department of Public Safety.

(c) Any person receiving such written notice provided for in paragraph (a) of this Section 4 shall have the right within 30 days from such notice to file an appropriate action for declaratory judgment to determine the validity of such written notice, but no such action shall, by reason of the commencement thereof, stay or in any way delay or postpone any prosecution for the violation of this Act."

The Petitioners, upon receipt of this notice had a clearly defined state remedy under the provisions of Section 4(c) as set forth above, but chose not to pursue this state remedy. Act 698 envisions an adversary proceeding prior to seizure and contains procedural safeguards. The list of publications, as initially determined

by the state officials to present reasonable cause to believe that there had been a violation of the Obscenity Law, includes such publications as "Masturbation and the Phallus", "Teenage Studs", "Young Boys and Sodomy", and "The Gay Sucker". This material itself establishes the good faith of the officials in their effort to enforce the law. There can be no actionable harassment in light of the state remedies available to Petitioners, Alga, Inc., and Trinkle, and especially in view of the acts which the Respondent State Officials were doing their best to regulate.

The case actually boils down to whether an accused in state criminal proceedings may constitutionally invoke federal injunctive jurisdiction by allegation of statements proportedly made by state law enforcement officers. If such were the law, defendants throughout the Nation could effectively halt almost any state criminal proceedings until the factual determination of what was and what was not said and the true context of such alleged statements was litigated in federal district court. This cannot be permitted.

The Petitioners complain that the names of customers were taken; that photographs of the business premises were made; that a trash container at the bookstore was searched; and that they were threatened with being run out of town. In every well handled criminal case, law enforcement officers compile lists of witnesses, oftentimes including business customers, associates and neighbors. To photograph the scene of an alleged crime is common in criminal investigation. Evidence is sought in trash containers every day in connection with normal and customary law enforcement work. Every defendant could allege that he was told something by an arresting officer which the accused

did not like, i.e. "The likes of you are going to have to leave this town", "You are going to jail", or hundreds of variations. These types of anxieties and inconveniences, together with bail and legal expenses were found by the Supreme Court in *Younger*, supra, not to constitute grounds for invoking federal injunctive relief.

The factual allegations of this case and the record of the state criminal proceedings show without question that Petitioner Trinkle was prosecuted with definite expectation of conviction under a criminal statute previously held constitutional by a three-judge federal tribunal. It is without factual dispute that the Petitioner is seeking and is being afforded constitutional protection in the State Courts. The Petitioners themselves allege that although they are limited, they are, in fact, "presently operating" their "adult book store."

The irreparable injury as set forth in *Dombrowski*[4] and as defined in *Younger*, supra, must be such as to effectively deprive a person of meaningful review on state appeal and to circumvent the constitutional rights of a defendant.

There is no factual allegation of such before this Court and neither is there a factually sufficient allegation that these Respondents prosecuted Petitioner Trinkle without expectation of conviction. Mr. Trinkle may not have liked being put through the process of arrest, trial and conviction, with the attendant unpleasant circumstances. However, as pointed out in *Younger*, supra, these factors of "costs, anxieties, and inconveniences" are incident to every criminal prosecu-

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4. *Dombrowski v. Pfister*, 380 U. S. 479, 85 S. Ct. 1116, 14 L. Ed. 2d 22 (1965).

tion and are not subject to and cannot form the basis for federal injunctive relief.

This Court, in *Cameron v. Johnson,* 390 U. S. 611, 88 S. Ct. 1335, 20 L. Ed. 2d 182 (1968), held that under *Dombrowski,* supra, a federal court should refuse to enjoin state criminal proceedings unless the federal jurisdiction affords the Petitioners "protection which they could not secure by prompt trial and appeal pursued to this Court". The Court, in *Cameron,* supra, also significantly noted:

> ". . . the question was whether the statute was enforced against them with no expectation of conviction but only to discourage exercise of protected rights".

The District Court below, after analyzing the complaint and the publications lists attached thereto concluded:

> "Some may even think that the state officials are derelict in their duty for not seeking additional prosecutions for the continued apparent violation of the state law."

In this regard, the Supreme Court, in *Cameron,* supra, held:

> "In any event, upon the adoption of the law, it became the duty of the authorities in good faith to enforce it and to prosecute for picketing that violated that law."

The state court found that the literature sold by Petitioners was such as to contain "not even the slightest social importance"; "no redeeming social value"; and that it was appealing "solely to purient interests". The correctness of this determination is not the issue

here—however, the list of publications themselves establishes the good faith justification for the state finding. It cannot be said that these Petitioners have not secured fair treatment in state court. It cannot be said nor has it been alleged that these Petitioners are not being afforded a full and fair appellate review in the state proceeding.

CONCLUSION

The Respondents respectfully submit that the Petition for Certiorari should be denied.

Respectfully submitted,

JOSEPH D. PHELPS

Attorney for Respondents

September 1972